Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-817

DONALD L. BRISENDINE and JOHN BASS,
Petitioners,

v.

NATIONAL MOVIE-DINE, INC., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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A Writ of Certiorari is respectfully sought to review the Court of Appeal's Order dismissing the appeal of the Petitioners.

OPINIONS BELOW

Fifth Circuit. The opinion of the Court below in this case was unreported. The Order dismissing the appeal is in the record.

District Court. The opinion of the District Court for the Northern District of Texas was unreported. Its Orders staying proceedings pending arbitration are set forth in the record.

District Court. The opinion of the District Court of the Southern District of New York was unreported. These Orders compelling arbitration are set forth in the record.

JURISDICTION

The order of the Court of Appeals was entered September 1, 1977. This Petition for Certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

Did the Court of Appeals err in dismissing the appeal in view of the following questions of law presented to the District Court?

1. Did the District Court err in staying all proceedings pending arbitration without regard to the Substantive Law of the State of Texas, the Texas Deceptive Trade Practices—Consumer Act, which contains a "no waiver" clause, and in so doing deprived Petitioners of their rights as citizens of a sovereign state?

2. Did the District Court's action of staying all proceedings pending arbitration deprive Petitioners of their constitutional rights as citizens of the United States by depriving them of the protection afforded by a Texas Statute concerning an area of commerce not preempted by Congress?

CONSTITUTIONAL PROVISIONS INVOLVED

The Tenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATUTORY PROVISIONS INVOLVED

The Deceptive Trade Practices-Consumer Protection Act, Texas Business and Commerce Code Annotated, Section 17.42, states the waiver policy of its law:

> "Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void."

Section 17.44 of the Statute states its construction and application and purpose:

> "This subchapter shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection."

Section 17.46 describes Deceptive Trade Practices as the following:

> (a) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
>
> (b) The term "false, misleading, or deceptive

acts or practices" includes but is not limited to, the following acts:

* * *

(2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;

(4) using deceptive representations or designations of geographic origin in connection with goods or services;

(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not;

* * *

(9) advertising goods or services with intent not to sell them as advertised;

(10) advertising goods or services with intent not to supply a reasonable expectable public demand, unless the advertisements disclosed a limitation of quantity;

* * *

STATEMENT OF THE CASE

This is a diversity action wherein Petitioners, DONALD L. BRISENDINE and JOHN BASS, residents and citizens of the State of Texas, brought suit against Respondents, NATIONAL MOVIE-DINE, INC. and CREATIVE CINE-TEL, INC., foreign corporations, and ERNEST BOGEN, LAWRENCE H.

FORRAY, CHARLES BOASBERG, HARVEY SCHLAGS, HERMAN RAUCHER, ROBERT S. COHEN ROBERT MOFFITT, and RALPH ROSS, residents and citizens of states other than the State of Texas. The District Court had jurisdiction under 28 U.S.C.A. Sec. 1332 as the matter in controversy was greater than $10,000.00 and was between citizens of different states.

Petitioners allege that during March and April of 1976 all Respondents engaged in business in the State of Texas by and through their agents and employees; such business activities consisting of advertising, interviewing, and entering into Distributor Licensing Agreements with Petitioners, such Distributor Licensing Agreements providing Petitioners with the exclusive right to exhibit motion pictures in certain restaurants in the Dallas-Fort Worth area and Houston-Beaumont area of the state of Texas. As a result of such activities, Petitioners entered into an agreement with NATIONAL MOVIE-DINE, INC. and, as a consideration, paid Twenty Thousand Dollars ($20,000.00) each for such licensing agreement. Each Distributor Licensing Agreement contained a provision relating to arbitration as follows:

> "17. Governing Law, Arbitration. "The provisions of the Agreement shall be governed by and construed in accordance with the laws of the State of New York. It is hereby agreed that any question, dispute, or controversy arising out of, in connection with, or in relation to this Agreement or its interpretation, performance or nonperformance of any breach thereof, shall be subject to the jurisdiction of the Supreme Court of the State of New York, in and for the County of New York;

and both parties hereto expressly consent to the jurisdiction of said Court.

"Any controversy, dispute or question arising out of any aspect of the Agreement, including the making thereof, shall be resolved by arbitration in accordance with the then existing rules of the American Arbitration Association conducted in New York, New York, and any judgment or any award (which may, subject to the terms hereof, include an award of damages or equitable relief) may be entered in any State or Federal Court having jurisdiction."

Petitioners subsequently filed suit in the United States District Court for the Northern District of Texas by which Petitioners contended that Respondents willfully, fraudulently, and deliberately withheld and misrepresented certain circumstances concerning the activities, obligations, and background of NATIONAL MOVIE-DINE, INC., and further knew that, if the facts were known, Petitioners would not have entered into a Distributor Licensing Agreement.

Petitioners alleged that Respondents are guilty of violation of the Deceptive Trade Practices-Consumer Protection Act, Sections 17.41-17.63 (Supp. 1976), and, as a result, Respondents are jointly and severally liable for three times the amount of actual damages in this cause as set out in the statute, plus reasonable attorney's fees, plus exemplary damages. In addition, Petitioners alleged breach of contract.

Subsequent to the filing of the complaint, Respondents requested and were granted an Order in the United States District Court, Southern District of

New York, on December 2, 1976, compelling arbitration in New York. On February 7, 1977, Petitioners moved in the United States District Court, Northern District of Texas, Dallas, to discover certain documents. This was followed by Respondents' Motion for a Protective Order until a decision was rendered on Defendants' Motion for Stay of Proceedings Pending Arbitration, which had been filed on November 24, 1976, in the same District Court. The Dallas District Court issued an Order staying all proceedings pending arbitration on April 14, 1977, and a slightly revised Order on April 21, 1977. Petitioner subsequently filed an appeal to the Fifth Circuit seeking a reversal of the District Court's ruling and a remand to continue with the judicial proceeding. Respondent's Motion to Dismiss the appeal was granted on September 1, 1977.

REASONS FOR GRANTING THE WRIT

1. *Conflict with other decisions.*

Consideration by this Court is necessary on the grounds that the holdings below conflict in substance with *Wilko v. Swan*, 346 U.S. 427 (1953), and were reached on the basis of the misapplication of *Prima Paint Corporation v. Flood and Conklin Mfg. Co.*, 388 U.S. 395 (1967), as being dispositive to the issue at bar.

In *Wilko* this Court held that the "no Waiver" provisions of the Securities Act took precedence over the arbitration agreement in the contract. The Court recognized that "the Securities Act was drafted with an eye to the disadvantages under which buyers

labor," and that a waiver of his right to sue in courts is a surrender of one of the advantages the Act gave him. *Id.* at 435.

The Texas Deceptive Trade Practices—Consumer Protection Act's stated purpose is also to protect a disadvantaged group, the consumers. Congress also has recognized consumers as disadvantaged by passing several laws whose purpose was their protection: Truth in Lending Act, 15 U.S.C.A., Sections 1601-1681 (1974), the Home Mortgage Disclosure Act, 12 U.S.C.A., Sections 2801-2809 (Supp. 1974), the Federal Trade Commission Act (Unfair Trade Practice), 15 U.S.C.A. 45 (a)(i) (Supp. 1977), and many more.

The Texas Act also contains an express "no waiver" provision such as that in *Wilko*, which was included to prevent the advantaged party from avoiding the effects of the Act. If the arbitration agreement is given effect in this case, the entire act will be avoided.

Although *Wilko* is distinguishable from the case at bar because it dealt with a Federal Statute rather than a State Statute, this Court has held that Federal Courts should enforce State created rights. *Bernhardt v. Polygraphic Company of America*, 350 U.S. 198 (1956). Furthermore, Congress has announced its public policy favoring consumers in several legislative enactments. See selected statutes listed, *supra*.

Prima Paint Corporation v. Flood and Conklin Mfg. Co., supra, which the Courts below based its decision

upon, was limited to the sole issue of whether a claim of fraud in the inducement of the entire contract is to be resolved by a Federal Court, or whether the matter is to be referred to arbitration. *Id* at 402. However, here the issue is whether State created rights, which are protected by "no waiver" provisions, may be waived by arbitration clauses.

There is no doubt that Texas Courts would disallow arbitration in order to protect the rights of its consumers as provided in the Deceptive Trade Practices—Consumer Protection Act, although due to the relative newness of the Act the matter has not been considered. It is clear that the Texas Legislature intended to protect consumers and did not intend to allow such rights to be contracted away. Thus, the Federal Court sitting in Texas should act as "only another Court of the State." *Bernhardt* at 203. "If the Federal Court allows arbitration where the State Court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. *Id* at 203.

Not only would a stay of proceedings substantially affect a cause of action created by the State of Texas, it would deprive Petitioners of their rights as citizens of Texas, and permit those shielded by an arbitration agreement to avoid liability to citizens of Texas for violation of Texas law. The issues raised by these conflicts are of continuing importance, and should be resolved by this Court.

2. *Impact on the consumer and his constitutional rights.*

The Federal Arbitration Act was never intended to,

and could not constitutionally, supersede State Substantive Law. In an article published by the American Bar Association's Committee on Commerce, Trade and Commercial Law, it was stated that "whether or not an arbitration agreement is to be enforced is a question of the law of procedure and is determined by the law of the jurisdiction wherein the remedy is sought." *The United States Arbitration Law and Its Application*, 11 A.B.A.J. 153, 154 (1925).

Here, Texas has preempted an area of commerce in which Congress has not acted. Petitioners, as residents of Texas, are entitled to the protection of the Texas Statute, especially when the Respondents made themselves subject to Texas law by their alleged conduct within the boundaries of the State.

Thus, the District Court should have applied Texas Substantive Law as required by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). There is no claim that the Texas Act is unconstitutional or inapplicable to the controversy. This Court should not permit the Federal Arbitration Act to deprive these Petitioners of their rights under a Texas statute regulating conduct which was specifically reserved for the States under the Constitution. In doing so, State legislation enacted for consumer protection would be useless against anyone with an arbitration clause, which would put the consumer in a helpless situation rather than even the disadvantaged position he now occupies.

CONCLUSION

For the reasons stated, this Court should grant this Petition for a Writ of Certiorari, and the judgment of the Courts below should be reversed, with instructions for such further proceedings as may be necessary.

Respectfully submitted,

S/.....
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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Petition for Writ of Certiorari were sent to Lans, Feinberg & Cohen, 555 Madison Avenue, New York, New York 10022, and Mr. Martin Barenblat, 2001 Bryan Tower, Dallas, Texas 75201, by placing same in the United States mail, postage prepaid, this 22 day of November, 1977.

S/
H. C. McCracken